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**IN THE
COURT OF APPEALS OF INDIANA**

JASON WIDMEYER,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 27A02-0712-CR-1050

APPEAL FROM THE GRANT SUPERIOR COURT
The Honorable Jeffrey D. Todd, Judge
Cause No.27D01-0502-FC-20

September 3, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issue

Jason Widmeyer appeals the trial court's revocation of his probation, raising the following issue for our review: whether the trial court erred in determining that Widmeyer violated the terms of his probation by failing to pay restitution in the form of child support. Concluding that the trial court properly revoked Widmeyer's probation, we affirm.

Facts and Procedural History

In 2005, the State charged Widmeyer with nonsupport of a dependent child, a Class C felony, for the period of April 2000 through January 25, 2005. The State charged Widmeyer with a Class C felony pursuant to Indiana Code section 35-46-1-5(a) because the total amount of unpaid support due was at least fifteen thousand dollars. Widmeyer and the State entered into a plea agreement that stated, in pertinent part:

[a]s a specific term and condition of the suspended portion of his sentence and probation in this cause, Defendant shall make continuing, regular, recurring child support and arrearage payments as criminal restitution, in the amounts determined to be appropriate by this Court.

Appellant's App. at 9. The trial court's sentencing order specified the following:

Based upon such, the Court now sentences the Defendant to the custody of the Indiana Department of Corrections for a term of imprisonment of six (6) years. The Court now suspends five and one-half (5 ½) years of Defendant's sentence and following service of one-half (½) year, the Court orders Defendant to serve formal, supervised probation for five and one-half (5 ½) years under the usual terms and conditions which include the following:

1. Defendant shall make continuing, regular, recurring child support and arrearage payments as criminal restitution. Defendant's tax refund check, if any, shall be applied to support arrearage.
- . . . Defendant's support and arrearage payment shall be paid by Income Withholding Order.

Id. at 11-12.

On February 8, 2006, the State filed a petition to revoke Widmeyer's probation. In the Petition for Revocation of Suspended Sentence, the State alleged that the trial court had sentenced Widmeyer as follows:

Six (6) years in jail, six (6) months executed and five and one-half (5 ½) years suspended and served on probation. Defendant to make continuing[,] regular, recurring, child support and arrearage payments in the amount of \$64.00 & \$10.00 per week.

Id. at 13. The petition alleged that Widmeyer was to report to the Grant County Probation Department for an intake appointment on December 14, 2005, but failed to report. The petition further alleged that Widmeyer had failed to make weekly child support and arrearage payments as directed, with his last payment being made on November 14, 2005. Following a hearing, the trial court found Widmeyer in violation of his probation and ordered him to serve his previously-suspended sentence at the Department of Correction. Widmeyer now appeals.

Discussion and Decision

I. Standard of Review

Probation is a matter of grace left to trial court discretion, not a right to which a criminal defendant is entitled. Prewitt v. State, 878 N.E.2d 184, 188 (Ind. 2007). The trial court determines the conditions of probation and may revoke probation if the conditions are violated. Ind. Code § 35-38-2-3(a); Prewitt, 878 N.E.2d at 188. A trial court's decision to revoke probation is reviewed for an abuse of discretion. Jones v. State, 885 N.E.2d 1286, 1290 (Ind. 2008). We will not find an abuse of discretion unless

“the trial court’s decision is against the logic and effect of the facts and circumstances before the court.” Prewitt, 878 N.E.2d at 188.

A probation revocation hearing is civil in nature and the State need prove the alleged violations by only a preponderance of the evidence. Ind. Code § 35-38-2-3(e); Cox v. State, 706 N.E.2d 547, 551 (Ind. 1999). When reviewing an appeal from the revocation of probation, we will consider all the evidence most favorable to the judgment of the trial court without reweighing that evidence or judging the credibility of witnesses. Cox, 706 N.E.2d at 551. If there is substantial evidence of probative value to support the trial court’s conclusion that a defendant violated any terms of probation, we will affirm its decision to revoke probation. Id. “Evidence of a single probation violation is sufficient to sustain the revocation of probation.” Smith v. State, 727 N.E.2d 763, 766 (Ind. Ct. App. 2000).

II. Failure to Pay Restitution

Widmeyer contends that the trial court abused its discretion in finding him in violation of the condition of his probation that he pay restitution because it did not first inquire into his ability to pay the restitution.

The statute authorizing restitution to be imposed as a condition of probation provides that the court shall fix the amount of restitution at the time of sentencing and the amount may not exceed an amount the person “can or will be able to pay.” Ind. Code § 35-38-2-2.3(a)(5). The statute dealing with probation revocation provides that “[p]robation may not be revoked for failure to comply with conditions of a sentence that imposes financial obligations on the person unless the person recklessly, knowingly, or

intentionally fails to pay.” Ind. Code § 35-38-2-3(f). The trial court must inquire into the defendant’s ability to pay in order to prevent indigent defendants from being imprisoned because of their inability to pay. Ladd v. State, 710 N.E.2d 188, 192 (Ind. Ct. App. 1999). Determining whether the failure to pay is reckless, knowing, or intentional requires the trial court to consider, at the time of the alleged violation, whether the defendant could have paid restitution but did not. Cf. Garrett v. State, 680 N.E.2d 1, 2-3 (Ind. Ct. App. 1997) (“Although the State contends that Garrett has waived her right to challenge the trial court’s restitution order because she did not object at the time it was entered . . . any such waiver is irrelevant given the State’s burden at the time it seeks to revoke probation to show that Garrett’s failure to pay restitution was reckless, knowing or intentional.”).

We note first that although Indiana Code section 35-38-2-2.3(a)(5) requires the trial court to fix the amount of restitution ordered as a condition of probation, neither the plea agreement nor the written sentencing order in this case fix an actual amount of restitution, referring only to “continuing, regular, recurring child support and arrearage payments.” See Appellant’s App. at 9, 12. However, the petition for probation revocation alleges that Widmeyer was ordered to pay restitution weekly in the amount of \$64.00 in child support and \$10.00 toward his arrearage. See id. at 13. At the probation revocation hearing, Widmeyer testified as follows:

[Defense counsel] Q: An’ you would agree that under the plea agreement one (1) of the terms of your plea an’ probation was that you were going to pay your support . . .

[Widmeyer] A: . . . Yes . . .

Q: . . . at I believe sixty-five dollars (\$65.00) a week with ten (10) on the arrearage each week . . .

A: . . . Seventy-five (75).

Q: Sixty-four (64) a week plus ten (10) on the arrearage, correct?

A: Yes.

Transcript at 7-8. It appears that, whether it was specifically stated at the sentencing hearing (of which we were not provided a transcript) or otherwise discussed, the trial court's restitution order was intended to reference the child support order to which Widmeyer was already subject. It also appears that, as Widmeyer acknowledged his specific monetary responsibility at the probation revocation hearing and did not then, nor does he now,¹ dispute the amount he was ordered to pay as restitution, Widmeyer knew his specific obligation with respect to the restitution condition of his probation. The only question, then, is whether the State proved that he recklessly, knowingly, or intentionally failed to pay the restitution.

Widmeyer acknowledged at the probation revocation hearing the amount of his child support and arrearage payments and admitted that he had not paid any support since being released from jail. See Tr. at 8. When asked why he had not made any payments, he answered, "because I ain't had no, I haven't had my own 'stablished home." Id. at 9. He testified that he had been paid for some work since being released but did not use any of that money for child support payments. See id. He also testified he had applied for work at fast food establishments, but he had not been to the unemployment office and had not gone to any temporary agencies. Thus, contrary to Widmeyer's assertion, inquiry was made into his financial circumstances at the

¹ The validity of a condition of probation is a separate issue from the propriety of revoking probation based on a violation of that condition. Widmeyer does not, but also could not, in an appeal from revocation of his probation, appeal the validity of the condition of probation because that is a part of his sentence that would have to be challenged on a timely appeal from his sentencing. See Stephens v. State, 818 N.E.2d 936, 939 (Ind. 2004) ("[A] defendant cannot collaterally attack a sentence on appeal from a probation revocation.").

revocation hearing. Despite being out of jail for several months prior to the filing of the petition for revocation, and despite having been paid at least on and off for work he performed during those months, Widmeyer failed not only to make a bona fide effort to pay the court-ordered restitution; but also to make any effort to pay. “If the probationer has willfully refused to pay or has failed to make a sufficient bona fide effort to acquire the resources to pay, the court may revoke probation and sentence the defendant to prison.” Champlain v. State, 717 N.E.2d 567, 571 (Ind. 1999) (quoting Bahr v. State, 634 N.E.2d 543, 535 (Ind. Ct. App. 1994)). Under these circumstances, the trial court did consider Widmeyer’s ability to pay the restitution and did not abuse its discretion in ordering that his probation be revoked for recklessly, knowingly, or intentionally failing to do so.

Conclusion

The trial court did not abuse its discretion in revoking Widmeyer’s probation for failing to pay the restitution ordered as a condition of his probation.

Affirmed.

BAKER, C.J., concurs.

RILEY, J., dissents with separate opinion.

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vs.)	No. 27A02-0712-CR-1050
)	
STATE OF INDIANA,)	
)	
Appellee-Plaintiff.)	

Judge, Riley, dissenting with separate opinion.

I respectfully dissent from the majority's decision to affirm the trial court's revocation of Widmeyer's probation.

The purpose behind an order of restitution is to impress upon the criminal defendant the magnitude of the loss he has caused and to defray costs to the victim caused by the offense. *Carswell v. State*, 721 N.E.2d 1255, 1259 (Ind. Ct. App. 1999). Here, however, the provision of the plea agreement which imposes criminal restitution and which forms the basis of the trial court's finding that Widmeyer violated his probation is rife with problems that are ignored by the majority.

First, as mentioned by the majority, I.C. § 35-38-2-2.3(a)(5) mandates that the amount of restitution be specified. Nevertheless, Widmeyer's plea agreement failed to set the amount, and instead merely insisted that Widmeyer pay "the amounts determined to be appropriate by this [c]ourt." (Appellant's App. p. 9).

Furthermore, while the trial court appears to change the terms of the plea agreement by including in its sentencing order the statement that “[d]efendant’s tax refund check, if any, shall be applied to support arrearage,” the trial court never rejected Widmeyer’s proposed terms of the plea agreement. (Appellant’s App. p. 12). The chronological case history and the trial court’s sentencing order are silent, with the Order merely stating that

The [c]ourt has considered the pre-sentence investigation report filed on the 6th day of December 2005, by the Grant County Probation Department and had considered the evidence presented at the guilty plea and sentencing hearings of [Widmeyer].

(Appellant’s App. p. 11). It is well settled that it is within the trial court’s discretion to accept or reject a plea agreement and the sentencing provisions therein, but once the trial court accepts the agreement, the court is bound by its terms and may impose only the sentence required by the plea agreement. *Shepperson v. State*, 800 N.E.2d 658, 659 (Ind. Ct. App. 2003).

Notwithstanding these problems, the criminal restitution provision of the plea agreement grants the criminal court concurring jurisdiction with the civil court. The condition of probation specifies that the child support and arrearage payments shall be set in the amount “determined to be appropriate *by this [c]ourt.*” (Appellant’s App. p. 9) (emphasis added). While child support and arrearage can be ordered as a condition of probation, only the act of payment can be imposed; whereas the amount to be paid must necessarily be determined by the civil court in its child support proceedings.

It is well established that child support is of the class of cases that Indiana superior courts have statutory jurisdiction to determine. I.C. § 31-12-1-1 allows judges of circuit

and superior courts of each judicial circuit to make a yearly determination of the necessity for a court designated as a “domestic relations court.” The jurisdiction of a domestic relations court is statutory:

(a) Whenever a domestic relations court is established under this chapter, the domestic relations court has jurisdiction over all proceedings in the following causes of action:

1. Dissolution of marriage.
2. Separation.
3. Annulment.
4. Child support.
5. Paternity.

(b) A domestic relations court has jurisdiction that other courts in Indiana have over the causes of action listed in subsection (a). A domestic relations court may dispose of the causes of action listed in subsection (a) in the manner provided by statute for those causes of action. However, this chapter grants supplemental powers to the domestic relations courts to aid the court in determining the difference between the parties and in protecting the welfare and rights of the child or children involved.

I.C. § 31-12-1-4. Further, our family law statutes provide additional authority for the superior court’s action in ordering child support. After considering the required statutory factors, a court “may order either parent or both parents to pay any amount reasonable for support of a child.” I.C. § 31-16-6-1(a).

In light of all these problems, I respectfully part ways with the majority and conclude that the trial court cannot find a probation violation based on an invalid condition of probation. Therefore, I dissent from the majority and I would reverse the trial court’s revocation of Widmeyer’s probation.